STATEMENT OF JURISDICTION OF SUPREME COURT

This is an action of assumpsit commenced by Insured, a resident of the State of Michigan, against petitioner, a New York corporation, in the Circuit Court for the County of Wayne, State of Michigan, to recover disability benefits in a policy of life insurance issued by petitioner to Insured (R. 1-4). The cause was removed by petitioner to the District Court of the United States for the Eastern District of Michigan, Southern Division (R. 6-11). Upon the death of Insured pending trial, the administrator of his estate, respondent herein, was substituted (R. 21). Petitioner admitted liability on an over-age-sixty basis, and the United States District Court held there was no further liability and gave judgment accordingly (R. 27-30). On appeal by respondent to the United States Circuit Court of Appeals for the Sixth Circuit the judgment of the District Court was reversed and judgment ordered entered for respondent on an under-age-sixty basis (R. 49-53). Petitioner's petition for rehearing was denied by that Court on February 14, 1941 (R. 71).

Certiorari is prayed and jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

It is submitted by petitioner that the decision of the United States Circuit Court of Appeals is:

(a) In conflict with the decision of this Court in Bergholm v. Peoria Life Insurance Co., 284 U. S. 489;

(b) In conflict with the decision of the Supreme Court of Michigan in Wetherall v. Equitable Life Assurance Society, 273 Mich. 580 (Cf. Erie Railroad Co. v. Tompkins, 304 U. S. 64, and Ruhlin v. New York Life Insurance Co., 304 U. S. 202);

(c) In conflict with the decision of the United States Circuit Court of Appeals (Eighth Circuit) in Orr v. Mutual Life Insurance Co., 64 Fed. (2d) 561; and

(d) In conflict with the great weight of authority and with settled principles of law.

It is furthed submitted that because of the large number of life insurance policies containing total and permanent disability provisions identical or similar to those involved herein, a matter of public interest is created which should be settled by this Court.

STATEMENT OF CASE

On January 8, 1923, petitioner, a New York corporation (R. 7), issued to Jacob M. Marshall of Detroit, Michigan, its certain policy of life insurance (R. 22).

The policy contained so-called total and permanent disability provisions, those pertinent to the issues here involved being as follows:

TOTAL AND PERMANENT DISABILITY

(I) "DISABILITY BENEFITS before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, that the Insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the Insured's age at nearest birthday is 60 years, in which event the Society will grant the following benefits:

(a) "WAIVE PAYMENT OF ALL PREMIUMS payable upon this policy falling due after the receipt of such proof and during the continuance of such total and permanent Disability; and

(b) "PAY TO THE INSURED A MONTHLY DISABILITY ANNUITY as stated on the face

hereof; the first payment to be payable upon receipt of due proof of such Disability and subsequent payments monthly thereafter during the continuance of such total and permanent Disability; provided that if this policy is continued under the Endowment conversion option, the Disability-Annuity payments shall continue only during such total and permanent disability until the maturity of the Endowment. (Note:—Any premiums so waived and any Disability-Annuity so paid shall not be deducted from any amount payable in any settlement of this policy.)

"Disability shall be deemed to be total when it is of such an extent that the Insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such TOTAL DISABILITY shall be presumed to be PERMANENT when it is present and has existed continuously for not less than three months; and further, the entire and irrecoverable loss of sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, will of themselves be considered as TOTAL AND PERMANENT DISABILITY within the meaning of this provision.

(II) "DISABILITY BENEFIT AFTER AGE 60.

"In case the Insured after attaining age sixty, and while this policy is in full force and effect, becomes totally and permanently disabled as above described, and furnishes due proof thereof, the Society, subject to the conditions above stated, will on each subsequent anniversary date of this policy during the continuance of such disability waive payment of the premium, if any, for the ensuing policy year, whereupon the amount of insurance shall become reduced by the amount of premiums so waived and subsequent premiums and loan and surrender values shall be reduced proportionately.

(III) "Recovery From Disability.

"The Society shall have the right at any time or times during the first two years after receipt of such proof of disability, but thereafter not more frequently than once a year, to require proof of the continuance of such total disability. If the Insured shall fail to furnish satisfactory proof thereof, or if it appears at any time that the Insured has become able to engage in any occupation or perform any work for compensation of financial value, no further premiums will be waived and no further Disability-Annuity payments will be made hereunder on account of such disability" (R. 41-43).

In an automobile accident on December 24, 1935, Marshall sustained a fractured wrist and two fractured ribs, technically described as commutated fracture of right radius at distal end and fracture of third and fourth ribs on left side posteriorly, as a result of which from December 24, 1935, he was unable to engage in any occupation (R. 25).

On April 16, 1937, Marshall surrendered the policy to petitioner's Detroit office and received therefrom a receipt reading as follows:

The Equitable Life Assurance Society
of the United States

New York City
Agency at Detroit, Mich., Apr. 16, 1937

"Received from Jacob Marshall

Policy No. 3,022,849, to be forwarded to the Home Office of the Society for endorsement of over age 60 benefits. This receipt does not in any way commit The Equitable Life Assurance Society of the United States to any action in connection with the said Policy.

By A. Urban."

(R.25)

Subsequently the policy was returned to Marshall bearing the following endorsements:

> "This policy has been approved for waiver of premiums as per endorsement hereon. Each premium waived reduces the insurance hereunder.
>
> "Subject to its terms and limitations for total and permanent disability, the policy has been approved, during the continuance of the Insured's total and permanent disability, for the waiver of premiums, payable on or after December 30, 1936, whereupon the amount of insurance shall become reduced by the amount of premiums so waived, and subsequent premiums and loan and surrender values shall be reduced proportionately. (Dated at New York, May 7, 1937)" (R. 24).

Thereafter petitioner tendered to Marshall its check for $855.90, being the premium due December 30, 1936, and the total amount due from petitioner to Marshall on an over-age-sixty basis (R. 25-26).

Marshall refused the tender, claiming to be entitled to under-age-sixty benefits (R. 25).

On November 8, 1937, Marshall commenced suit against petitioner in the Circuit Court for Wayne County, Michigan (R. 1). Petitioner removed the cause to the United States District Court for the Eastern District of Michigan (R. 6-11).

Before trial Marshall died, the cause of death being angina pectoris, the duration, twenty-four hours (R. 26). His death having been suggested, respondent administrator of his estate was substituted (R. 21). A jury was waived (R. 22), the facts stipulated (R. 22-26), and the cause tried to the court (R. 27).

The District Court found only one question to be involved, to-wit: Was respondent entitled to recover on an under-age-sixty or an over-age-sixty basis (R. 28)?

The District Court was of opinion that from the provisions of the policy and the nature of Marshall's injuries due proof of total and presumably permanent disability could not have been furnished until March 24, 1936, nearly three months after the anniversary date of the policy nearest Marshall's sixtieth birthday (R. 29). Judgment for respondent on this basis was accordingly entered (R. 30).

The opinion of the District Court is found on pages 27 to 29 of the record.

On appeal by respondent to the United States Circuit Court of Appeals for the Sixth Circuit that court reversed the District Court and entered judgment for respondent on an under-age-sixty basis, granting recovery from date of accident to date of death (R. 49-53).

The United States Circuit Court of Appeals held that the three months' presumption of permanency clause does not exclude the right of Insured to show that the commencement of his total and permanent disability was actually concomitant with the accident (R. 51). That Court fails to point out where in the record is found the fact that Insured submitted due proof to petitioner that his total and permanent disability commenced from date of accident, and the record is bare of such proof.

The United States Circuit Court of Appeals further thought the policy ambiguous (R. 51), but wherein the ambiguity is found, it fails to state. The opinion of the Court of Appeals (R. 50-53) is reported in 116 Fed. (2d) 901.

The judgment of the United States Circuit Court of Appeals was entered January 10, 1941 (R. 49). Thereafter petitioner filed a petition for rehearing (R. 55-58), which was denied February 14, 1941 (R. 71).

SPECIFICATION OF ERRORS RELIED ON

FIRST: Said Circuit Court of Appeals erred in reversing the judgment of the District Court.

SECOND: Said Circuit Court of Appeals erred in granting to respondent monthly disability benefits from date of accident to date of death.

THIRD: Said Circuit Court of Appeals erred in assuming that Insured had submitted due proof to petitioner that his total and permanent disability commenced with date of accident.

FOURTH: Said Circuit Court of Appeals misinterpreted the plain language of the policy in question.

FIFTH: Said Circuit Court of Appeals erred in holding said policy of insurance to be ambiguous.

SIXTH: Said Circuit Court of Appeals erred in assuming that Insured became totally and permanently disabled before December 30, 1935, the anniversary date of the policy nearest Insured's sixtieth birthday.

SUMMARY

It is the contention of petitioner that the judgment of the Circuit Court of Appeals is erroneous, for the following reasons:

1. (a) To sustain the judgment, respondent's intestate must have become totally and permanently disabled. Both elements must co-exist.

Brod v. Detroit Life Ins. Co., 253 Mich. 545;
Wetherall v. Equitable Life Assurance Society, 273 Mich. 580;

and

(b) To justify a recovery commencing from date of accident, Insured must have submitted due proof to peti-

tioner that on and after December 24, 1935, he was totally and permanently disabled. The record is bare of such proof.

2. The submission to petitioner of due proof of both total and permanent disability is a condition precedent to any liability.

Bergholm v. Peoria Life Ins. Co., 284 U.S. 489;

Thomas v. Prudential Ins. Co., 131 Neb. 274;

The Equitable Life Assurance Society v. Adams, 56 Ga. App. 5;

Mullaney v. The Equitable Life Assurance Society, 66 N. D. 235;

The Equitable Life Assurance Society v. McCausland, 331 Pa. 107;

Saul v. New York Life Ins. Co., 92 Fed. (2d) 665.

3. No recovery of disability benefits prior to submission of due proof to petitioner can be sustained.

Orr v. Mutual Life Ins. Co. of N. Y., 64 Fed. (2d) 561;

Lincoln National Life Ins. Co. v. Ghio, 111 Fed. (2d) 307;

Mullaney v. Equitable Life Assurance Society, 66 N. D. 235.

4. Liability is determined only from the time of submission of proofs.

Wetherall v. Equitable Life Assurance Society, 273 Mich. 580;

Orr v. Mutual Life Ins. Co. of N. Y., 64 Fed. (2d) 561;

Mutual Life Ins. Co. of N. Y. v. Wheatley, 243 Ky. 69.

5. Insured sustained only a fractured wrist and two fractured ribs. Such injuries from their very nature, at least in the absence of due proof to petitioner to the contrary, could not be said to instantly render Insured both totally and permanently disabled. Insured must therefore rely upon that clause of the policy—

> "Total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months."

The presumption of permanency does not arise until March 24, 1936—three months after the date of the accident and three months (less five days) after the anniversary of the policy nearest Insured's sixtieth birthday. The judgment of the District Court determining petitioner's liability on an over-age-sixty basis should have been affirmed by the Court of Appeals.

Berg v. Equitable Life Assurance Society, 149 Misc. Rep. (N. Y.) 856;

Mackenzie v. Equitable Life Assurance Society, 140 Misc. Rep. (N. Y.) 655;

The Equitable Life Assurance Society v. Adams, 56 Ga. App. 5;

Mullaney v. The Equitable Life Assurance Society, 66 N. D. 235;

Jabara v. The Equitable Life Assurance Society, 280 Ill. App. 147;

The Equitable Life Assurance Society v. McCausland, 331 Pa. 107;

Wetherall v. Equitable Life Assurance Society, 273 Mich. 580.

BRIEF OF ARGUMENT

I.

Disability benefits are provided for only in the event of total and permanent disability. Both elements must co-exist.

The policy provides:

> "Disability benefits * * * shall be effective upon receipt of due proof * * * that the Insured became totally and permanently disabled * * *." (R. 23, 41-42).

In construing similar language the Supreme Court of Michigan, in *Brod v. Detroit Life Insurance Co.*, 253 Mich. 545, at page 547, said:

> "The policy is not ambiguous and there is no occasion for the application of the rule that it will be construed against the insurer. It is not a straight disability contract. It requires that the disability, to be compensable, shall be both total and permanent. Both elements must coexist. Shipp v. Metropolitan Life Insurance Co., 146 Miss. 18 (111 So. 453). A temporary total disability, even for a year, followed by only partial disability, is not within the benefits. Ginell v. Prudential Life Insurance Co., 237 N. Y. 554 (143 N. E. 740), reversing 205 App. Div. 494 (200 N. Y. Supp. 261)."

In construing the identical language involved in the instant case the Supreme Court of Michigan reaffirmed the foregoing quotation in *Wetherall v. Equitable Life Assurance Society of the United States*, 273 Mich. 580. 584.

II.

What constitutes total and permanent disability is clearly defined in the policy.

The policy provides:

> "Disability shall be deemed to be total when it is of such an extent that the Insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such *Total Disability* shall be presumed to be *Permanent* when it is present and has existed continuously for not less than three months; and further, the entire and irrecoverable loss of sight of both eyes or the severance of both hands at or above the wrists, or of both feet at or above the ankles or of one entire hand and one entire foot, will of themselves be considered as *Total and Permanent Disability* within the meaning of this provision" (R. 42).

III.

Due proof of total and permanent disability is a condition precedent to any liability.

It will be observed that the policy not only requires the insured to be totally and permanently disabled, but requires due proof thereof to be submitted to petitioner before any liability is created.

The policy provides:

> "(I) Disability Benefits Before Age 60 shall be effective *upon receipt of due proof* * * * (R. 41).

It further provides:

> "(a) Waive payment of all premiums * * * *after the receipt of such proof* * * *" (R. 42).

And further provides:

> "(b) Pay to the Insured * * *, the first payment to be payable upon receipt of due proof * * *" (R. 42).

And further provides:

> "In case the Insured, after attaining age 60 * * * becomes totally and permanently * * * and furnishes due proof thereof * * *" (R. 42).

In construing similar language this Court said, in *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 489, 491-492:

> "Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums becoming due after the receipt of such proof."

In construing the language used by petitioner in its policies the Supreme Court of Pennsylvania, in the case of *Equitable Life Assurance Society of the United States v. McCausland*, 331 Pa. 107, 111, said:

> "Where a policy of life insurance provides that disability benefits will be payable upon receipt of due proof that the insured has become totally and permanently disabled, and that the payment of all premiums falling due after the receipt of such proof and during the continuance of such disability will be waived, the furnishing of the proof of disability is a condition precedent."

In *Lombardi v. Metropolitan Life Insurance Co.*, 271 Mich. 265, 269, the Supreme Court of Michigan said:

> "Viewing plaintiff's testimony, however, in the most favorable light, since defendant contends that

a verdict should have been directed in its favor, the claim for permanent and total disability must fail because none of the notices provided for in the policy were given."

The following cases require proof of total and permanent disability as a condition precedent to any liability:

Avery v. New York Life Insurance Co., 67 Fed. Rep. (2d) 442 (Fifth Circuit);

Eagan v. New York Life Insurance Co., 67 Fed. Rep. (2d) 899 (Fifth Circuit);

Lincoln National Life Insurance Co. v. Ghio, 111 Fed. Rep. (2d) 307;

Griffiths v. Mass. Mutual Life Insurance Co., 96 Fed. (2d) 57 (Second Circuit).

IV.

Liability is determined as of the date of submission of due proof, and not prior thereto.

In *Mullaney v. Equitable Life Assurance Society*, 66 N. D. 235, 238-239, the Supreme Court of North Dakota, in construing provisions identical with those here involved, said:

"The contract went into effect in July, 1925. If, after that date, and before the insured reached the age of 60 years, she furnished to the company due proof that she had become totally and permanently disabled by bodily injury or disease, the defendant agreed to waive the payment of further premiums on the life insurance as well as disability benefits, and to pay her a stipulated monthly payment. But such benefits and payments did not *become effective* until the company received due proof of the disability. After such proof was furnished the first monthly payment was payable

from the date of the receipt of the due proof of disability and subsequent payments would be made monthly thereafter during the continuance of the disability.

"The term 'effective' as it relates to disability benefits does not differ in meaning from the same term when applied to the policy itself. Before any rights accrued to the insured, the policy itself had to become 'effective,' that is, go into effect and be binding upon the parties. The contract could not become effective until all the steps required to make a contract had been complied with or waived. The same way with the disability benefits. The right to these benefits does not go into effect until the prerequisites occur—the contract must remain in force, the insured must not be over 60 years of age, must be totally and permanently disabled, and due proof of such disability must be furnished the company. All these are necessary steps before the disability benefits become effective. The time this portion of the contract goes into effect—payment of disability benefits—is as much a fundamental element as is the disability itself. As to the scope of the word 'effective,' see Interlaken Land Co. v. Yakima County, 122 Wash. 340; 210 P. 796, 797.

"The right to receive these benefits does not differ from any other right to receive money. The recipient must comply with his obligations—one of which is to give due notice of disability, and then, and not until then, do the disability benefits begin."

In *Jabara v. Equitable Life Assurance Society of the United States,* 280 Ill. App. 147, the insured became totally and permanently disabled April 1, 1928. He furnished proof of disability in July, 1932. His claim for disability benefits was granted and payments made for July, 1932, and subsequent months. Suit was brought to recover the benefits for 48 months prior to submis-

sion of due proof. The Appellate Court of Illinois, in construing language identical with that involved in the instant case and in denying recovery by insured, said (pp. 149-150):

> "'We think the policy is clear and unambiguous in the instant case. It provides that the payment of fifty dollars a month for disability commences when the proof of disability is made. It specifically provides that 'the first payment to be payable upon receipt of due proof of such disability, and subsequent payments monthly thereafter during the continuance of such total and permanent disability.' This language is plain, and there is no room for construction. The first payment of fifty dollars is payable 'upon receipt of due proof of such disability' and subsequent payments 'monthly thereafter'."

In the case of *Equitable Life Assurance Society v. Adams,* 56 Ga. App. Rep. 5, the plaintiff became totally and permanently disabled in 1930. Proof of disability was not filed with the company until 1935, at which time the claim was allowed, payment of further premiums waived, and payment of disability benefits commenced. Suit was brought by the plaintiff to recover for monthly disability benefits and waiver of premiums between the time he became disabled in 1930 and the date of furnishing proof in 1935. In denying recovery, the Court of Appeals said (pp. 8-9):

> "The policy provides that disability benefits 'shall be effective upon receipt of due proof.' The key word is 'effective.' A rent contract is entered into, effective on a certain date. An increase in salary is made effective on a certain date. A law is enacted, effective on a certain date * * *. The decisions in Jabara v. Equitable Life Assurance Society, 280 Ill. App. 147, and Mullaney v. Equitable Life Assurance Society, supra, both dealing with provisions of a policy which were identical with those with which we are dealing in the instant

case cited the Bergholm case, recognized the distinction therein drawn, and stated in effect what we are now deciding, that under an insurance policy with a provision that 'the disability benefits shall be effective upon receipt of due proof that the insured became totally and permanently disabled after this policy became effective, the first payment to be payable upon receipt of due proof of such disability and subsequent payments monthly thereafter,' no payments were due until after such proof was made, notwithstanding actual disability existed for approximately five years earlier."

In *MacKenzie v. The Equitable Life Assurance Society of the United States*, 139 Misc. Rep. (N. Y.) 288; affirmed, 140 Misc. Rep. (N. Y.) 655, the insured had been totally disabled for a period in excess of six months, which was not disputed. At the time of presenting his claim to the society he had recovered from his disability. In construing the clause, "disability shall be deemed to be total when it is of such an extent that the insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months," the Court held that plaintiff's admission that he had recovered from his disability at the time he presented his claim was fatal to his cause of action.

V.

From nature of Insured's injuries, he must rely on three months' presumption of permanency provision.

The policy provides:

"Total disability shall be presumed to be permanent when it is present and has existed con-

tinuously for not less than three months; and further, the entire irrecoverable loss of sight of both eyes or the severance of both hands at or above the wrists or of both feet at or above the ankles or of one entire hand and one entire foot, will of themselves be considered as Total and Permanent Disability within the meaning of this provision" (R. 42).

The Insured sustained a fractured wrist and two fractured ribs (R. 25).

The District Court said:

> "The Court is of opinion that under the terms of the insurance contract, Marshall's total and permanent disability must be construed as having commenced, not on December 24, 1935, the date of his automobile accident, but three months later, on March 24, 1936. That this is so clearly appears from the provisions of the contract. In order to recover, whether the disability be on an over-age-sixty or an under-age-sixty basis, Marshall must have been totally and permanently disabled. Both elements must coexist; and from the nature of his injuries it cannot be said that the injuries themselves were necessarily permanent. Under the terms of the policy injuries of the nature sustained by Marshall, in order to be permanent, must have been sustained and have existed continuously for not less than three months prior to the date of furnishing due proof of total and permanent disability. Obviously, therefore, due proof of total and presumably permanent disability could not have been furnished until March 24, 1936, which was nearly three months after the anniversary date of the policy nearest Marshall's sixtieth birthday" (R. 28-29).

The District Court, among others, relied upon the case of *Berg v. Equitable Life Assurance Society*, 149 Misc.

Rep. (N. Y.) 856 (R. 29), where the policy provisions were identical with those here involved.

In the *Berg* case it was stipulated that the insured became totally disabled on March 9, 1933, and that such disability continued and became presumptively permanent on June 9, 1933, and was existing at the time suit was instituted. The one question involved was whether the insured was entitled to recover for the full period of disability or only for the time accruing subsequent to the expiration of the three months. After quoting the pertinent provisions of the policies, the Court says (pp. 857-859):

> "According to the above-quoted provisions, it is clear that, in order for the plaintiff to be entitled to disability benefits, he must be *totally and permanently disabled*. Total disability, while it is temporary, does not create any liability on the company. At this point it is to be noted that the policies divide 'total and permanent disability' into two classes: the entire irrecoverable loss of sight or the severance of both hands, etc., in and of themselves conclusively establish permanent total disability. Any other affliction, 'when it is present and has existed continuously for not less than three months,' will be presumed to be permanent. The ailment from which plaintiff is and has been suffering (a fractured leg) clearly falls within the latter classification. It could not have become presumably permanent until it had existed for three consecutive months. Until such time, plaintiff could not submit due proof. The earliest date, therefore, upon which plaintiff became entitled to the payment of benefits was June 9, 1933, three months after the injury was sustained.
>
> "This brings us to the point in issue. It is plaintiff's contention that, regardless of the necessity for the expiration of three months before he could claim benefits, once that period has elapsed

and the presumptive permanency established, he became entitled to benefits from the date of actual commencement of the total disability. In support of his contention, he urges the general rule that policies of insurance are to be most strongly construed against the insurer. This rule, however, is applicable only where the meaning of the language used is ambiguous (Marcus v. United States Casualty Co., 249 N. Y. 21, 24). It is not a rule with which to impose liability regardless of reasonableness. As stated by Crane, J., in Aldrich v. N. Y. Life Ins. Co. (235 N. Y. 214, 224):

'A construction which makes the contract fair and reasonable will be preferred to one which leads to harsh and unreasonable results.'

"It is true that there is no express provision that disability benefits are to begin at the end of the three months, but an analysis of the entire scheme of the policies leads to a necessary implication of such provision. They provide for benefits 'if the insured become wholly and permanently disabled.' According to express provision, the injury from which plaintiff is suffering could become presumptively permanent only after three months have expired, and in that event the company undertakes, upon receipt of due proof, to waive *subsequent* premiums and to pay disability benefits. Reading these provisions 'so as to make the scheme of the policy reasonable' (Bushey & Sons v. American Ins. Co., 237 N. Y. 24, 28), they indicate an intention not to be liable for any payments during that three-month period.

* * *

"Plaintiff attempts to distinguish the cases cited upon the ground that there the clause read, '*beginning at the date* of receipt of such proof of disability' the company will pay, etc., whereas in the case at bar the clause reads, 'disability benefits shall be *effective upon receipt* of due proof.' This is a distinction without a difference, for, given

> their ordinary connotation, the words used have the same meaning. Plaintiff further argues that to the words, 'the first payment to be payable upon receipt of due proof,' should be added the words 'for a period accruing prior to the date of receipt of such proof.' A sufficient answer to such contention is that 'We are not at liberty to revise while professing to construe' (Cardozo, J., in Goldstein v. Standard Accident Ins. Co., 236 N. Y. 178, 183)."

In *Corbett v. Phoenix Mutual Life Insurance Co.,* 144 Misc. Rep. (N. Y.) 872, the Court had before it a policy containing provisions substantially the same as those of the policy in the instant case, and the same question was involved, to-wit, the right to recover benefits from date of disability. The Court held there could be no recovery prior to the lapse of six months' time, as provided in the policy. The evidence in that case showed that on July 18, 1931, the insured became in fact totally and permanently disabled as a result of sinusitis and multiple infectious arthritis. On February 17, 1932, proof of his disability was received at the home office, the claim was allowed, and benefits paid from that date. Plaintiff contended that he was entitled to recover benefits from July 18, 1931, to February 17, 1932. In denying recovery the Court said (pp. 873-874):

> "Total permanent disability is defined and divided into two classes by clause '(e)'. The loss of certain members conclusively establishes permanent, total disability. Any other disease or affliction must first be proven to constitute total and permanent disability, but where the total disability has existed 'continuously for a period of at least six months' it will be presumed to be permanent. The ailment from which plaintiff is suffering falls within the latter classification. The very nature of plaintiff's condition makes it impossible to determine whether it would totally disable plaintiff per-

manently unless sufficient time elapses, which this policy fixes at six months. There might be a marked improvement within that period, and in that case what appeared at the beginning to be a permanent disability would prove to be but temporary. It is for that reason that disability provisions in life insurance policies almost generally, although variously, provide that a total disability shall not be presumed to be permanent unless it has continued for a stated time.

"Therefore, plaintiff could not submit proofs to the company that he was suffering from a presumably total and permanent disability until six months had expired from July 18, 1931. * * * It follows that defendant was under no obligation to make any benefit payments or to waive any premiums until February 17, 1932, which was the date when it received plaintiff's claim. Plaintiff's right did not accrue until said date. The receipt of proofs of claim by the company is a condition precedent to the liability of the company to make benefit payments. The payments and the waiver of premiums are not dependent upon the existence of presumptive permanent disability as a physical fact, from the date of its commencement. What imposes liability, and grants a corresponding right, is the actual receipt of proofs of the disability as presumably permanent, upon the ground that it has continued for six months. If no such proof is ever furnished, the company's said liability would never begin (Bergholm v. Peoria Life Ins. Co., 284 U. S. 489; 52 S. Ct., 230; 76 L. Ed. 416)."

In *Perlman v. New York Life Insurance Co.* 234 App., Div. Rep. (N. Y.) 359, the provisions of the policy there involved were not materially different from the provisions of petitioner's policy. On April 17, 1931, the company received at its home office proof that plaintiff, since December 15, 1930, had been continuously totally disabled from arthritis of both knees, legs, etc. Follow-

ing receipt of proofs defendant approved disability benefits as of March 15, 1931. Plaintiff commenced suit, seeking to recover the three monthly payments between the dates of December 15, 1930, and March 15, 1931. We quote from the Court's opinion (pp. 361-362):

> "Plaintiff claims that the disability clause is ambiguous, and that the policies do not clearly state that disability payments commence only from the receipt of proof. We do not find any ambiguity; and therefore are not called upon to make a choice of interpretation. It would strain the terms of the policies to hold that defendant is obligated to pay disability benefits for the period of three months prior to receipt of proof.
>
> "Therefore, as 'total disability' did not become 'presumably permanent disability' under the policy definitions until it had lasted three months, we hold that defendant has fulfilled its obligations."

In *Mutual Life Insurance Co. of New York v. Wheatley*, 243 Ky. Rep. 69, the Supreme Court of Kentucky had before it Total and Permanent Disability provisions reading in part as follows:

> "Disability presumed permanent after ninety days continuous disability. If the insured should be totally disabled as defined in this policy for a continuous period of not less than ninety days, such disability shall, during its further continuance, be presumed to be permanent * * *." (p. 72)

It appeared that the insured was totally disabled from January 13, 1929 to May 29, 1929, when he recovered. The company conceded liability for the last two months of this five-month period, and the case involved solely its liability for the first three months of the disability. In denying recovery the Court said (p. 74):

> "While it is true that during the five-month period appellee was ill he was totally disabled,

> yet it is not contended that his illness was of such character as that in human probability he would not recover within a period of time temporary in its nature. This being true, he was not permanently disabled in fact, and he was relegated for any right to disability insurance to the amendment printed on the back of his policies, which, as stated, provided for no disability insurance until after the expiration of a ninety-day period."

In *Wetherall v. Equitable Life Assurance Society*, 273 Mich. 580, the Supreme Court of Michigan had before it for construction a policy identical in terms with that here involved. In that case the plaintiff sustained an accident on April 1, 1930, in which he suffered a fractured pelvis and rupture of the urinary bladder, followed by peritonitis. In March of 1933, when he had recovered, he notified petitioner of the accident which he had sustained. In denying recovery the Supreme Court of Michigan said (pp. 583-585):

> "Having recovered from his total temporary disability, can disability be held total and permanent within the terms of the insurance contract?
>
> "That it was total for a period is manifest, but time has demonstrated that it was but temporary, and not permanent.
>
> "It was aptly stated in Mutual Life Ins. Co. of New York v. Wheatley, 243 Ky. 69, 73; 47 S. W. (2d) 961:
>
> 'The term "total" implies a concept of completeness, without regard to time * * *. On the other hand, the term "permanent" implies a concept of time.'
>
> "In the case at bar was the term 'permanent' employed in the contract to connote disability for life or for a period somewhat more than temporary?

"In Metropolitan Life Ins. Co. v. Blue, 222 Ala. 665 (133 South. 707, 79 A. L. R. 852), it was said of a similar policy:

'Appellee (insured) conceives that because the policy provides for payments to begin within three months after total disability intervenes, and because the insurer reserves the right to call additional proofs from time to time after accepting proofs of permanent total disability, the expression "totally and permanently disabled," covers that disability for three months, or some other undefined period. Some authority for such construction is not lacking. But the great weight of authority is otherwise, and for good reason. "Permanent" has a well-known obvious meaning; is in contradiction to "temporary," so used in legal enactments as well as contracts. The construction insisted upon would wipe out all distinction between "temporary" and "permanent" disability.

'So, the provisions mentioned are properly construed as affording a reasonable time to ascertain whether the disability is "total and permanent," and to keep open the question if after events disclose that it was not in fact permanent, but only reasonably appeared so to be.'

"Many authorities are cited in that opinion.

"In Brod v. Detroit Life Ins. Co., 253 Mich. 545, Mr. Justice Fead, speaking for the court, said of the policy there involved:

'It is not a straight disability contract. It requires that the disability, to be compensable, shall be both total and permanent. Both elements must coexist. Shipp v. Metropolitan Life Ins. Co., 146 Miss. 18 (111 South. 453). A temporary total disability, even for a year, following by only partial disability, is not within the benefits. Ginell v. Prudential Life Ins. Co., 237 N. Y. 554 (143 N. E. 740), reversing 205 App. Div. 494 (200 N. Y. Supp. 261).'

"Our opinion in that case was cited and followed in Job v. Equitable Life Ins. Co. of Iowa, 133 Cal. App. (Supp.) 791 (22 Pac. 2d, 607).

"In Lewis v. Metropolitan Life Ins. Co. (La. Ct. of App.), 142 South. 262, it was said:

'The word "permanent" to the lay mind has a well-defined meaning. It is the antonym of "temporary," and to give it the meaning contended for by plaintiff would be equivalent to deleting it entirely from the contract and substituting in its place the word "temporary" which, no doubt designedly, was omitted therefrom. It would be an absurd construction of this contract to say that plaintiff was "totally and permanently disabled" for 21 months.'

"If total disability continues for three months it may become permanent but whether so or not depends upon future continuance, and to provide for proof thereof from time to time the contract provides for examinations.

"Plaintiff's disability was total for many months but was neither total nor permanent when he sought compensation.

"Counsel cites cases contrary to the views we have expressed but as has been said in other cases they are contrary to the weight of authority and also to the opinion of this court in Brod v. Detroit Life Ins. Co., supra.

"The premium for this policy was slight and the contract was, therefore, of limited scope."

VI.

The Circuit Court of Appeals erroneously assumed that due proof of total and permanent disability commencing from date of accident had in fact been submitted to petitioner.

In its opinion (R. 51) the learned Court says:

"The expression of a presumption that total disability is permanent after its continuous existence

> for three month does not exclude the right to show that the effective time of the commencement of assured's total and permanent disability was actually *concomitant with the accident.*"

In making the foregoing terse statement the Court of Appeals has overlooked the fact that the policy clearly defines what constitutes total and permanent disability. Petitioner submits that from the nature of Marshall's injuries (a fractured wrist and two fractured ribs) (R. 25) and from the provisions of the policy defining total and permanent disability (R. 41-43), his total disability could not possibly have been presumed permanent until three months had elapsed from date of accident. The Court's statement is also entirely erroneous because it assumes that Marshall had, as a matter of fact, submitted due proof to petitioner that his total and permanent disability commenced with date of accident. The record is completely devoid of any such proof.

The case was tried in the District Court on a stipulation of facts (R. 22-26). It appears from the stipulation that on April 16, 1937, Marshall surrendered his policy to the Detroit office of petitioner for endorsement of over-age-sixty benefits (R. 25) and that on May 7, 1937, the policy was so endorsed at the Home Office of petitioner (R. 24). It was further stipulated that as a result of his automobile accident Marshall, from the date thereof, was unable to engage in any occupation (R. 25), and that he died on August 9, 1938, of heart trouble, the duration of which was twenty-four hours (R. 26).

We reiterate, the record fails to substantiate the presumption indulged in by the learned Court of Appeals.

VII.

The Circuit Court of Appeals erroneously construed and disregarded the pertinent provisions of the policy.

The Court of Appeals states:

> "The assertion that the disability benefits 'shall be effective upon receipt of proof' that total and permanent disability befell assured before age sixty is not equivalent to a statement that the insurer shall not be liable for the first three months of such disability, or shall not have the basis of its liability for disability benefits fixed as of the date of actual total and permanent disability. It seems clear from the policy that the disability benefits to which assured would be entitled must be established by the event of total and permanent disability. The maturity of the time for paying assured for his first three months disability is merely postponed until the furnishing of the required proof. In our judgment, this is the correct interpretation of the terms of the policy."
>
> (R. 51)

The foregoing quotation and the preceding one in subdivision VI hereof contain the nub of the opinion of the Circuit Court of Appeals.

With all due deference to that learned Court, we think it apparent that it has made no attempt to consider and construe the total and permanent disability provisions as a whole, but has rather elected to give its own interpretation of isolated portions thereof. To illustrate: The Court says:

> "It seems clear from the policy that the disability benefits to which assured would be entitled must be established by the event of total and permanent disability."
>
> (R. 51)

The Court completely ignores the fact, however, that the policy clearly defines what constitutes total and permanent disability and provides:

> "Total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months."
>
> (R. 42)

The words "and has existed continuously for not less than three months" are apparently to be disregarded. The Supreme Court of Michigan thought otherwise when it said:

> "If total disability continues for three months it may become permanent but whether so or not depends upon future continuance, and to provide for proof thereof from time to time the contract provides for examinations."
>
> —*Wetherall v. Equitable Life Assurance Society,* 273 Mich. 580, 585.

And the New York Court likewise, when it said:

> "The entire and irrecoverable loss of sight, or the severance of both hands, etc., in and of themselves conclusively establish permanent total disability. Any other affliction, 'when it is present and has existed continuously for not less than three months,' will be presumed to be permanent. The ailment from which plaintiff is and has been suffering (a fractured leg) clearly falls within the latter classification. It could not have become presumably permanent until it had existed for three consecutive months. Until such time plaintiff could not submit due proof."
>
> —*Berg v. Equitable Life Assurance Society,* 149 Misc. Rep. (N. Y.) 856, 858.

To further illustrate: The Court of Appeals interprets the words "shall be effective upon receipt of proof" as

merely postponing the time of payment, but not the amount thereof (R. 51). No mention is made of the further provisions defining petitioner's obligations after it has received due proof, as follows:

> "(a) Waive Payment of All Premiums payable upon this policy falling due *after* the receipt of such proof, etc., and
>
> "(b) Pay to the Insured a Monthly Disability Annuity as stated on the face hereof; the first payment to be payable upon receipt of due proof of such Disability and subsequent payments monthly thereafter," etc. (R. 42)

The reasoning of the Court of Appeals in this regard is exactly contrary to that of the Supreme Court of North Dakota:

> "To the extent to which this would establish the doctrine that upon the furnishing of due proof the right to disability benefits would mature at the time of the date of the disability, we cannot concur. The reasoning of the Federal Supreme Court cited from the Bergholm Case has more compelling force with us."
>
> —*Mullaney v. Equitable Life Assurance Society of the United States*, 66 N. D. 235, 241.

The Court of Appeals further thought the policy ambiguous (R. 51) but fails to point out wherein the ambiguity is found. In construing identical language, the following cases found no ambiguity:

> *Jabara v. Equitable Life Assur. Soc.*, 280 Ill. App. 147, 149.
>
> *Mullaney v. Equitable Life Assur. Soc.*, 66 N. D. 235, 240-241.
>
> *Berg v. Equitable Life Assur. Soc.*, 149 Misc. Rep. (N. Y.) 856-858.

Petitioner submits that the interpretation of its policy in the instant case by the United States Circuit Court of Appeals cannot be reconciled with, and is contrary to, the decisions of:

THE SUPREME COURT OF MICHIGAN in *Wetherall v. Equitable Life Assurance Society of the United States*, 273 Mich. 580;

THE SUPREME COURT OF PENNSYLVANIA in *Equitable Life Assurance Society of the United States v. McCausland*, 331 Pa. 107;

THE SUPREME COURT OF NORTH DAKOTA in *Mullaney v. Equitable Life Assurance Society of the United States*, 66 N. D. 235;

THE ILLINOIS APPELLATE COURT in *Jabara v. The Equitable Life Assurance Society of the United States*, 280 Ill. App. 147;

THE GEORGIA COURT OF APPEALS in *Equitable Life Assurance Society of the United States v. Adams*, 56 Ga. App. 5; and

THE MUNICIPAL COURT OF NEW YORK in *Berg. v. The Equitable Life Assurance Society of the United States*, 149 Misc. Rep. 856.

In conclusion, it is submitted that this record presents a case of sufficient general importance, and containing sufficient apparent error, to justify its review by this Court by certiorari.

Respectfully submitted,

FERRIS D. STONE
CLEVELAND THURBER
WILLIAM J. SHAW,
FREDERIC S. GLOVER, JR.,
Attorneys for Petitioner.